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No. 96-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

HOME DEPOT U.S.A., INC.,
*Petitioner,*

v.

VICKI BUTLER, *et al.*,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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December 12, 1996

## QUESTIONS PRESENTED

1. Whether the Seventh Amendment permits the certification of a class action in circumstances where separate "follow-up" juries will be required to reconsider issues that were already decided by a different "common-issues" jury?

2. Whether Federal Civil Rule 23 permits the certification of a class under Rule 23(b)(2), which does not provide any opt-out right, in a case in which the claimants seek no specific injunctive or declaratory relief, but seek significant monetary relief in the form of compensatory and punitive damages, and if so, whether such a certification would violate the Due Process Clause?

## LIST OF PARTIES

The ultimate parent company of petitioner Home Depot U.S.A., Inc. is The Home Depot, Inc. Petitioner's direct parent is Home Depot International, Inc., the sole wholly owned subsidiary of the ultimate parent. Petitioner's sole non-wholly owned subsidiary is Newco Productions, L.L.C.

The named plaintiffs in these cases are Vicki Butler, Susan Ellis, Felicia Funderburk, Jaqueline Genero, Sheryle Jones, Kimberly Stoddard, Cheryl Williams, Theresa Frank, Kathrine Toma, and Kathleen York on behalf of themselves and all others similarly situtated, and Jamie Wilson, an individual.

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v.

VICKI BUTLER, ET AL.,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit. Petitioner seeks review of the Ninth Circuit's continuing practice of permitting class certifications in circumstances where many separate "follow-up" juries will be required to reconsider issues that were decided previously by a different "common-issues" jury, which contravenes the Seventh Amendment. Further, in this case the Court of Appeals misinterpreted and misapplied Federal Civil Rule 23(b)(2), which does not provide any opt-out right, by interpreting it to allow certification of a class seeking substantial compensatory and punitive damages under the Civil Rights Act of 1991, Pub.

L. No. 102-106, 105 Stat. 1071 (1991), thus raising due process issues similar to those presently before the Court in *Adams v. Robertson*, No. 95-1873.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished and is reproduced in the Appendix ("App.") to this petition at 1a. The unreported opinions of the District Court in this case are reproduced at App. 3a and 11a. The reported opinion of the District Court in a virtually identical class action filed against petitioner in the Eastern District of Louisiana, *Griffin v. Home Depot, Inc.*, is reported at 168 F.R.D. 187 and reproduced at App. 27a.

## STATEMENT OF JURISDICTION

The Court of Appeals denied petitioner's petition for a writ of mandamus on September 13, 1996, and took the unusual step of ordering that "[n]o motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket." App.2a.

Petitioner filed a timely petition for rehearing. The Clerk initially accepted the petition, but later notified petitioner that the petition would not be considered because the Court of Appeals had closed the docket on September 13, 1996 upon entry of the denial of the writ of mandamus.

The Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

The Fifth Amendment to the Constitution states, in pertinent part: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The Seventh Amendment to the Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

This case was certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, which is reproduced in full at App. 36a. The pertinent statutory provision, 42 U.S.C. § 1981a, is reproduced in full at App. 37a.

## STATEMENT OF THE CASE

1. *Factual Background.* Petitioner, Home Depot U.S.A., Inc. ("Home Depot"), is a rapidly growing retailer in the home improvement industry. It sells products used in construction and remodeling projects, ranging from lumber and building materials to garden items. Home Depot also provides the know-how needed to select and use these products. It presently operates more than 460 stores in 35 States and employs approximately 95,000 people throughout the country.

Home Depot's nationwide operations are divided into several regional divisions. The West Coast Division ("WCD") comprises ten states: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Texas, Utah, and Washington. The WCD includes 130 home improvement warehouses/stores in which there are approximately 26,000 employees, about 9,000 of whom are female.

2. *Plaintiffs' Complaint.* In their class-action complaint, the named plaintiffs have alleged both disparate-treatment and disparate-impact gender discrimination. Specifically, they contend that Home Depot has discriminated against females in its WCD with respect to almost every aspect of its employment decisionmaking, including hiring, initial job placement, training, transfers, promotions to supervisory and management positions, and compensation, in violation of both Title VII, as amended, and the California Fair Employment & Housing Act,

Cal. Gov't Code §§ 12900 *et seq.* Plaintiffs allege, among other things, that Home Depot's employment practices are subjective, lacking specific objective criteria for hiring, pay, or promotion, thus giving local managers broad discretion to make decisions that are intentionally discriminatory or that adversely affect women. Plaintiffs further allege that individual class members were subjected to intentional discrimination and suffered substantial damages as a result. Plaintiffs' complaint plainly seeks damages for back pay, front pay, lost compensation and job benefits, emotional distress, humiliation, embarrassment, exemplary and punitive damages, attorneys' fees, and pre-judgment and post-judgment interest. The complaint, however, is considerably less clear with respect to any claim for injunctive relief, seeking only generalized and unspecified injunctive and declaratory relief.

Home Depot denied the material allegations of the complaint and pointed out, in particular, the extraordinary employment opportunities it has generated for men *and* women, as well as its longstanding commitment to equal employment opportunity in the home improvement industry, which historically has not been well populated with women.

3. *Plaintiffs' Request for Class Certification.* Plaintiffs requested that the District Court certify this case as a class action. Specifically, plaintiffs proposed that the claims of discrimination be tried for each class member in two separate phases. At the first phase, a single "common-issues" jury would hear evidence about the allegations that Home Depot had engaged in discriminatory practices and would make findings about liability, punitive damages, injunctive relief and declaratory relief. (8/30/95 Hr'g Tr. at 9). At the second phase, each of the plaintiffs would then litigate the issues raised by the facts of their particular cases before one of numerous "follow-up" juries, which would make findings about "damages issues." (8/30/95 Hr'g Tr. at 24-25).

Home Depot opposed this proposed class certification on two main grounds. First, it argued that the two-phase trial plan envisioned by plaintiffs violated its right to a jury trial under the Seventh Amendment. Home Depot contended that the holistic

nature of the ultimate legal inquiry into intentional discrimination under Title VII requires consideration of the totality of the evidence presented by both parties before a finding of intentional discrimination can be made. Thus, the issue of liability cannot be split up between the class jury in the first phase and the follow-up juries in the second phase without violating the Seventh Amendment.

Second, Home Depot pointed out that plaintiffs' requests for monetary relief in the form of compensatory and punitive damages for mental anguish render this case inappropriate for class treatment under Federal Civil Rule 23(b)(2), which provides no opt-out right for class members. Home Depot argued that this case could not be properly certified under Rule 23(b)(2), and that the use of that provision to certify a class action seeking significant monetary damages is both improper in itself and would violate the constitutional rights of absent class members under the Due Process Clause.

4. *The District Court's Certification Order.* Despite these objections, the District Court certified a class of plaintiffs under Rule 23(b)(2) and defined the class to include: (i) all female employees of Home Depot within the WCD on or after November 5, 1992; and (ii) all female applicants for employment at Home Depot within the WCD on or after November 5, 1992 who were qualified to fill positions of salespersons or assistant managers but who were not hired for those positions. App. 11a-12a. The class currently has more than 217,000 members, which includes about 17,000 current and former employees and about 200,000 applicants. These numbers will increase through normal turnover because the certification order contains no cut-off date for entry into the class.

The court ordered that the litigation would proceed in two separate phases. The initial phase will address "liability and relief applicable to the class as a whole . . . and whether defendant is liable for punitive damages." App. 12a. Then, if discrimination is found, each claimant will proceed to a second phase, which will address "individual compensatory and equitable relief, including entitlement to back and front pay."

App. 12a. For purposes of the first phase only, the court certified the class under Rule 23(b)(2), which allows for class treatment of claims only where injunctive or declaratory relief predominates over claims for monetary relief, and which thus provides no opt-out right. App. 12a, 21a. The court refused to issue any definitive ruling on certification with respect to the second phase, leaving the parties to speculate as to whether it will proceed under Rule 23(b)(2) or Rule 23(b)(3). App. 12a, 23a.

Although plaintiffs have never specified the nature of the injunctive relief they seek (other than job posting), the court rejected Home Depot's argument that this class could not be certified under Rule 23(b)(2). Although Home Depot's financial exposure in this case could exceed $65 billion,[1] the court determined that plaintiffs' "claims for damages are secondary to their primary claim for injunctive relief to prohibit gender biased employment practices." App. 20a. Even though the plaintiffs bear the burden of proving that class certification is appropriate, the court simply characterized Home Depot's argument that the monetary claims for compensatory and punitive damages overwhelm the generalized claim for unspecified injunctive relief as "conclusory, and at this early stage, speculative." App. 21a.

The District Court rejected Home Depot's argument that issues and evidence in the two phases necessarily overlap in an employment discrimination class action where compensatory and punitive damages are sought, and that, as a consequence, the order denies Home Depot its Seventh Amendment rights. App. 21a-23a. In brushing aside these constitutional concerns and granting certification under Rule 23(b)(2), the court relied almost exclusively on cases decided before the passage of the

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[1] The Civil Rights Act of 1991 caps punitive and compensatory damages at $300,000 for each person who can demonstrate that she was the victim of intentional discrimination. With approximately 217,000 potential class members, the potential exposure exceeds $65 billion; that figure does not include potential monetary relief in the form of back or front pay for individual class members.

Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071 (1991), which amended Title VII to permit jury trials and the recovery of punitive and compensatory damages, which were not previously available in such cases. Remarkably, the court cited these older, *bench-trial cases* as support for its conclusion that there was no violation of *the right to a jury trial* under the Seventh Amendment. App. 23a.

5. *The Petition for Mandamus.* Home Depot immediately asked the District Court to certify these issues for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), but the court denied this request without explanation or analysis. App. 4a.

Home Depot then petitioned the Ninth Circuit Court of Appeals for a writ of mandamus to compel the District Court to vacate its order certifying the class, enter a new order denying certification of the class, and dismiss the class allegations. In the petition, Home Depot again presented the objections it had raised first before the trial court. The California Employment Law Council and Lawyers for Civil Justice asked for leave to file an *amicus curiae* brief on behalf of Home Depot. Home Depot also later moved the Ninth Circuit to consider new case authorities holding that certification of this type of class action is inappropriate.[2] The Ninth Circuit denied Home Depot's petition, its motion to consider new case authorities, and the motion for leave to file the *amicus curiae* brief. App. 2a. What is more, the panel took the unusual step of completely closing the appellate docket in the Ninth Circuit.

On September 27, 1996 Home Depot filed a timely petition for rehearing *en banc*. Three days later, a filing clerk for the Ninth Circuit notified Home Depot that the rehearing petition had been improperly accepted for filing because the docket had

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[2] *See Brooks v. Circuit City Stores*, 1996 WL 406684, 71 Fair Empl. Prac. Cas. (BNA) 102 (D. Md. June 17, 1996); *Zapata v. IBP, Inc.*, 1996 WL327970, (D. Kan. May 15, 1996); *Appleton v. Deloitte & Touche LLP.*, 1996 WL 406175 (M.D. Tenn. July 3, 1996); *McKnight v. Circuit City Stores, Inc.* 168 F.R.D. 550, 1996 WL 549363 (E.D. Va. Aug. 23, 1996).

been closed by the terms of the court's order denying the writ of mandamus. App. 2a. The panel's order thus had the further effect of foreclosing any review of this case by the full court.

6. *Related litigation.* Home Depot is currently defending two other gender-based class action suits. Plaintiffs in *Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996), allege discrimination in Home Depot's Northeast, Southeast, and Midwest Divisions. Plaintiff in *Tortajada v. Home Depot, Inc.*, No. 96-2927 (D.N.J.), alleges discrimination in Home Depot's nine-state Northeast Division. Although both the *Griffin* and *Tortajada* complaints mirror the complaint filed in this case, and all of the parties are represented by the same counsel, neither of those cases has been certified for class action treatment. Indeed, the *Griffin* court specifically held, in direct contradiction to this case, that certification under Rule 23(b)(2) would *not* be appropriate. App. 33a. The *Tortajada* court has stayed the class-action aspects of that case until the related litigation is resolved. App. 43a.

## REASONS FOR GRANTING THE WRIT

Home Depot seeks review of two issues raised by the ruling below, each of which presents "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10(c). First, the court below upheld the certification of a class action in circumstances where separate "follow-up" juries will have to reconsider issues previously decided by a single "common-issues" jury, in violation of the Seventh Amendment. Second, the court below held that a class seeking significant monetary damages can be properly certified under Rule 23(b)(2), which does not provide any opt-out right, without violating the Due Process Clause of the Fifth Amendment -- the same issue that is currently before the Court in *Adams v. Robertson*, No. 95-1873.

## I. THE DECISIONS BELOW HIGHLIGHT THE SPLIT OF AUTHORITY CONCERNING WHETHER THE SEVENTH AMENDMENT PERMITS CLASS CERTIFICATION WHERE SEPARATE "FOLLOW-UP" JURIES WILL BE REQUIRED TO RECONSIDER ISSUES ALREADY DECIDED BY A DIFFERENT "COMMON-ISSUES" JURY.

The order certifying this case as a class action is an example of an increasingly common and controversial form of class certification. In the past, recognition that litigation of a claim would require the consideration of numerous individual issues -- going to the heart of not just the amount of damages, but also the determination of liability itself -- would have led to a denial of class certification. *See, e.g., Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 329 (5th Cir. 1978). That is no longer the case. Instead, numerous courts, urged on by the plaintiffs' class-action bar, have certified class actions despite the presence of critical individual issues, through the device of certifying only the so-called "common issues" for class treatment. The individualized issues that are not suitable for class treatment are deferred until many separate "follow-up" trials that, at least in theory, will occur after the common-issues trial occurs. We say "in theory" because courts can count on the fact that, unless their decisions are reviewed on mandamus or other means of interlocutory appeal, neither the first phase nor the second phase of such a trial will ever occur because the colossal expense of the first phase and the almost unlimited exposure that could result will force most defendants to settle. *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (describing the "intense pressure to settle" imposed by such class certification orders as prompting "blackmail settlements"), *cert. denied*, 116 S. Ct. 184 (1995).

A number of Courts of Appeal, however, have examined such coercive class certifications on interlocutory appeal and found them incompatible with the Seventh Amendment and this Court's controlling decision in *Gasoline Products Co. v.*

*Champlin Refining Co.*, 283 U.S. 494 (1931). *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996); *Rhone-Poulenc*, 51 F.3d at 1302-04. Specifically, these courts have found that the certification orders, in trying to separate common issues capable of class treatment from individual issues, violate the Seventh Amendment right "to have juriable issues determined by the first jury empaneled to hear them . . . and not reexamined by another finder of fact." *Id.* at 1303; *see also Castano*, 84 F.3d at 750 ("The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues."). In other words, the Seventh Amendment forbids a scheme in which numerous follow-up juries will necessarily reconsider issues already adjudicated by the single common-issues jury. *See, e.g., Gasoline Products*, 283 U.S. at 500.

### A. The Certification Order In This Case Violates Home Depot's Seventh Amendment Rights.

The certification order in this case, in trying to separate class issues from individual issues, creates this same type of Seventh Amendment violation. It is a far cry from the customary bifurcation of all liability issues from all damages issues. Instead, the court has subdivided the issue of liability *itself* in a strained effort to make this case fit within the class action model. While a few aspects of liability have been deemed to turn in large measure on issues that are common to the class, others are hopelessly individual and have been left for the follow-up trials. Although the District Court apparently envisioned that it could make a final determination of liability for injunctive relief and punitive damages at the close of the first phase, it is entirely unclear how that would be possible as long as evidence critical to a finding that *any* class member has been the victim of intentional discrimination will not yet have been heard. What is patently clear, however, is that at the end of the common-issues trial, *there will be no final determination of liability with respect to any individual class member*. In reality, the best plaintiffs can hope for is that the common-

issues trial will establish a rebuttable presumption of liability, and that the further disputed individual claims will be determined in the individual class member's favor in the follow-up trial. The problem, however, is that the remaining individual issues are not separate and distinct from the common issues. To the contrary, adjudication of the individual issues will require the numerous follow-up juries to reconsider issues already decided by the class jury and to reevaluate the same evidence.

The considerable overlap of issues and the inevitable need for reconsideration of evidence by the follow-up juries is a function of the nature of plaintiffs' case and the law of employment discrimination as developed by this Court. This is not a case in which plaintiffs are advancing only a disparate-impact claim for which they seek only injunctive relief. Instead, plaintiffs allege a disparate-treatment claim of a pattern or practice of intentional discrimination.

This Court has explained that in a Title VII case the "liability" phase of a class action trial does not result in a conclusive determination of liability for each of the individual plaintiffs. Rather, if plaintiffs meet their burden of proof in this first phase, they merely establish a rebuttable presumption of intentional discrimination. The burden then shifts to the employer in the second phase to prove that the individual plaintiff was denied an employment opportunity for a legal reason. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977). And as this Court recently clarified, if the employer provides some evidence that its decision with respect to an individual employee was justified by a non-discriminatory reason, and the employee produces some evidence that the proffered legal justification was pretextual, the jury must consider all of the evidence in determining whether or not the preponderance of the evidence supports a finding of intentional discrimination in favor of the individual plaintiff. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 523-24 (1993); *see also id.* at 533 (Souter, J., dissenting) (complaining that "the Court now holds that the *further inquiry is wide open*") (emphasis added). Thus, if the

employer demonstrates a nondiscriminatory reason for its decision before one of the follow-up juries, and the individual plaintiff comes forward with evidence of pretext, the follow-up jury will need to consider all the evidence -- including all the evidence considered by the common issues jury -- to make a final liability determination.

In a case such as this, it will be impossible for the follow-up juries to determine whether individual class members have been discriminated against without weighing all the evidence (including evidence common to the class as well as evidence that is specific to the class member). The first common-issues jury will make its burden-shifting finding based on both statistical and anecdotal evidence. The subsequent follow-up juries will not be able to make any determination of liability without considering -- which is to say impermissibly reconsidering -- both the anecdotal evidence with respect to those individual claimants and the statistical evidence with respect to every claimant for whom the various presumptions are satisfied such that *St. Mary's* requires the follow-up juries to consider the totality of the circumstances in order to make the ultimate determination whether there was intentional discrimination.[3] This need for the follow-up juries to

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[3] Plaintiffs will try to establish a presumption of discriminatory practice in the phase I trial, in part by showing statistical "underrepresentation" or "overrepresentation" of females in particular job categories in Home Depot's WCD. Under *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989), Home Depot has the right to rebut these statistics by showing that they do not reflect the sexual composition of the "qualified population in the relevant labor market." The "relevant labor market" will necessarily vary from phase I, in which plaintiffs allege it will comprise the entire WCD, to phase II, in which the pool will undoubtedly be much more localized. Under *Wards Cove*, Home Depot has a right to challenge the statistics as inapplicable to the relevant labor market during each phase. The follow-up juries will therefore necessarily re-evaluate the validity of plaintiffs' statistical evidence (and the sufficiency of plaintiffs' discrimination claims) in violation of the

reconsider and redetermine issues heard by the common issues jury -- in addition to rendering the class jury proceeding an expensive waste of time -- violates the Seventh Amendment.

In short, the relevant evidence simply does not cleave neatly into bipolar worlds of "common" evidence and "individual" evidence, which may be considered in isolation from each other. Instead, the law requires juries to evaluate both forms of evidence side by side, as they pertain to each individual plaintiff, before making a determination of liability based on the totality of the circumstances.

The extent of this inevitable overlap is evident, for example, with respect to specific issues such as the following:

*Example One -- Initial job assignments*: Plaintiffs focus on the alleged fact that women are assigned to cashier jobs much more frequently than men. The parties disagree as to why that is true. Plaintiffs ascribe the disparity to gender discrimination; Home Depot relies on the unremarkable fact that it often makes initial job assignments based on the previous work experience and stated preferences of the job applicant. This evidence rebuts not only the source of the claimed statistical disparity and so the probative force of the statistical evidence, but also bears upon the individual claims of the class members. Thus, no matter what is decided in the common-issues trial at the first phase, resolution of a claim of alleged discrimination in initial job assignments by later follow-up juries will necessarily require reexamination of Home Depot's general hiring practices. In particular, it will require reexamination of Home Depot's practice of assigning new hires to the jobs they apply for, in conjunction with an analysis of the claimant's job application and previous experience (as well as other claimant-specific evidence), to determine whether gender (as alleged by plaintiffs) or stated job preference and/or prior experience (as contended by Home Depot) explains the initial job assignment.

*Example Two -- Pay disparities*: The same is true with respect to pay. Plaintiffs contend that women's entry-level pay is generally less than that of men and that the reason, again, is

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Seventh Amendment.

gender discrimination. Home Depot cites a number of nondiscriminatory factors, including the applicant's immediate past salary and the amount of salary requested by the applicant, as nondiscriminatory bases for its initial pay decisions. Once again, this evidence both presents a nondiscriminatory reason for any claimed statistical disparity while simultaneously negating the specific claims made by individual class members. Any individual claim based on the initial pay rate would necessarily require reexamination by a follow-up jury of Home Depot's standard practices, along with a review of the claimant's application, including the pay level requested, salary history, previous experience, and the position assigned. The many follow-up juries would not be able to perform their functions without reexamining at least some of the issues already addressed in the first phase by the common-issues jury.

In sum, the certification order here raises the Seventh Amendment problems identified in the *Gasoline Products* case with a vengeance. *Gasoline Products* established that even the customary separation of the entirety of liability issues from the entirety of damages issues cannot be made without a careful analysis to ensure that the two sets of issues are sufficiently distinct to preserve the substance of the Seventh Amendment right to a jury trial. In *Gasoline Products* itself, the Court determined that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to the denial of a fair trial." 283 U.S. at 500. The Seventh Amendment violation here -- where the question of liability itself is subdivided between two juries -- is even more glaring.

### B. There Is A Substantial Split Among The Circuits On This Important Constitutional Issue.

That the District Court and the Ninth Circuit have certified this class action in the face of this serious constitutional problem is no accident or a mere case-specific misapplication of *Gasoline Products*. The Ninth Circuit has expressly rejected

the analysis of the other Courts of Appeals in the course of disregarding the Seventh Amendment problems raised by this novel and coercive form of class certification. Most recently, in *Valentino v. Carter-Wallace*, 97 F.3d 1227 (9th Cir. 1996), the Ninth Circuit rejected defendants' argument that a separate trial of "common issues," which would leave individual liability issues for the follow-up juries, violated the Seventh Amendment. *See id.* at 1232. The Ninth Circuit explicitly declined to follow the contrary view of the Seventh Circuit in *Rhone-Poulenc*:

> This constitutional concern of the *Rhone-Poulenc* court may not be fully in line with the law of this circuit, and constitutional issues were never squarely presented to the district court. *See Arthur Young* [*& Co. v. United States Dist. Ct.*, 549 F.2d 686, 696 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977)].
>
> We therefore do not accept Carter-Wallace's invitation in this case to adopt the principles of *Rhone-Poulenc* as the law of this circuit.

*Valentino*, 97 F.3d at 1232.

As *Valentino* indicated, the Ninth Circuit has long taken an inhospitable view of the Seventh Amendment guarantee established in *Gasoline Products*. In *Arthur Young*, the Ninth Circuit rejected, on mandamus, a claim that a class certification order premised on a two-phase trial in which certain liability issues would decided before a class jury, while others would await follow-up juries, violated the Seventh Amendment. *See* 549 F.2d at 693-97.

Nor is the Ninth Circuit alone in taking this narrow view of the Seventh Amendment. Recently, in *In re Copley Pharm., Inc.*, 161 F.R.D. 456 (D. Wyo. 1995), the court surveyed the circuit law with respect to this issue, and identified a number of cases outside the Ninth Circuit that expressly or implicitly rejected Seventh Amendment concerns with respect to class certification orders that separated common issues from individual issues in an effort to facilitate class treatment. *See id.* at 462-64. Among the decisions identified were *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *In re*

*School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); and *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993). Emboldened by this circuit court precedent, *Copley* dismissed *Rhone-Poulenc* and its view of the Seventh Amendment as representing "the exception rather than the rule." 161 F.R.D. at 462. The Court concluded:

> This Court chooses to join those courts in their progressive treatment of mass torts and disagrees with the Seventh Circuit's decision to take a massive leap back to the time before Rule 23 class actions. The weight of the current law demonstrates that the Seventh Amendment is not violated by the separation of common issues of liability for class treatment.

*Copley*, 161 F.R.D. at 464; *accord Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 (M.D. Fla. Mar. 12, 1996); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994).

Recent decisions of the Fifth and Seventh Circuits take a sharply different view. The Seventh Circuit analyzed the Seventh Amendment issue in depth in *Rhone-Poulenc*. In that case, the District Court certified a class of hemophiliacs who alleged that suppliers of blood products acted negligently in failing to screen blood to detect the HIV virus. The trial court envisioned that common issues, such as whether the suppliers acted negligently, would be tried by a class jury, with individual issues, like comparative negligence and proximate cause, to be adjudicated by follow-up juries. The Seventh Circuit granted a petition for mandamus based in part on the failure of this trial plan to comply with the Seventh Amendment. The Seventh Circuit recognized that "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury empaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." 51 F.3d at 1303. The court acknowledged that some bifurcations -- like the customary division between liability and

damages -- are compatible with the Seventh Amendment, but emphasized that "that the district judge must carve at the joint." *Id.* at 1302. The Seventh Circuit concluded that dividing the elements of liability between those suitable for class treatment and those that are too individualized for common adjudication does not result in a clean division of issues that is compatible with the Seventh Amendment: the individual "issues overlap the issue of the defendants' negligence." *Id.*

The Fifth Circuit recently followed the Seventh Circuit's lead in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *see also McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993). In *Castano*, the Fifth Circuit reviewed a District Court's order certifying a nationwide class action including all past and present smokers. The certification order purported to separate common issues relevant to the defendants' conduct from individual issues concerning the conduct and decisions of each smoker, and certified only the former issues for class treatment. In reversing the certification order, the Fifth Circuit stressed "the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment." 84 F.3d at 750. As in *Rhone-Poulenc*, the court recognized that "[t]he Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." *Id.* The court concluded that in light of the need for impermissible reexamination of the common issues by the individual follow-up juries, "class treatment can hardly be said to be superior to individual adjudication." *Id.* at 751. In reaching this conclusion, the Court expressly relied on the Seventh Circuit's decision in *Rhone-Poulenc* (and, of course, this Court's decision in *Gasoline Products*). Other courts have likewise adhered to this reading of the Seventh Amendment and the *Gasoline Products* decision. *See, e.g., Franchi Construction Co. v. Combined Ins. Co. of Am.*, 580 F.2d 1, 7-8 (1st Cir. 1978); *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463 (W.D. La. 1995); *McKnight v. Circuit City Stores, Inc.*, 168 F.R.D. 550, 1996 WL 549363 (E.D. Va. Aug. 23, 1996).

This circuit split represents two different and irreconcilable approaches to the interplay between the Seventh Amendment and the class action vehicle for trying individual claims. It is not simply a matter of some courts approving skillful bifurcations while others disavow more problematic subdivisions of related issues. The split of authority runs much deeper. In many of these cases, the same plaintiffs' lawyers and the same trial plans are involved.

The decisions that allow class certification of common issues uniformly stress the efficiency of allowing the class action to go forward. *See, e.g.*, *Valentino*, 93 F.3d at 1232-33; *Central Wesleyan*, 6 F.3d at 185; *In re School Asbestos*, 789 F.2d at 1008; *Arthur Young*, 549 F.2d at 696. These courts have suggested that the common-issues trial will result in "[s]ignificant economies," *Central Wesleyan*, 6 F.3d at 185, and "substantial savings in time and resources," *In re School Asbestos*, 789 F.2d at 1008. In addition, these courts have tended to reiterate this Court's observation in *Gasoline Products* about the need for flexibility in interpreting the Seventh Amendment's protections. In *Arthur Young*, for example, the Ninth Circuit observed that "*Gasoline Products*, with its emphasis on the substance of the right to a jury trial rather than its form, speaks directly to contemporary courts faced with modern litigation of substantial complexity." 549 F.2d at 693; *accord Copley*, 161 F.R.D. at 463.

By contrast, the decisions that deny class certification in the identical posture emphasize strongly that efficiency concerns cannot trump the command of the Seventh Amendment, and stress the actual holding of *Gasoline Products*, rather than its dictum. As the First Circuit concluded, while concerns with efficiency "are undoubtedly important, they should not control the decision to conduct separate trials before different juries if the issues to be so tried are not separate and distinct." *Franchi Constr.*, 580 F.2d at 7. Likewise, the Fifth Circuit has rejected the argument that these unprecedented class-action proceedings are simply a modern adaptation that retains the substance of the traditional jury trial as it existed at the common law. Instead, *Castano* concluded that "'traditional

ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial,'" which is violated by placing some of these issues before a single class jury and reserving the remainder of them for numerous subsequent follow-up juries. *Castano*, 84 F.3d at 751 (*quoting In re Fibreboard*, 893 F.2d 706, 711 (5th Cir. 1990)).

This split in authority, moreover, is not limited to mass tort cases, but is also increasingly evident in the Title VII context because of the significant changes effected by the Civil Rights Act of 1991 ("CRA"). Prior to 1991, class-action litigation involving claims of employment discrimination was commonly divided into separate phases because Title VII litigants had no right to a jury trial, and therefore the Seventh Amendment was not implicated by such proceedings. *See e.g.*, 5 H. Newberg, *Newberg on Class Actions* § 24.123, at 24-414 to -416 (3d ed. 1992). The CRA changed all that by permitting litigants in Title VII cases for the first time to recover compensatory and punitive damages, and by creating a new right to a jury trial in all cases in which damages are sought. As a result -- and especially in light of this Court's recent clarification in the *St. Mary's* decision that the Title VII inquiry emphatically requires consideration of the totality of the circumstances, *see* 509 U.S. at 507, 523-24 -- those class-action bifurcations that were customary before passage of the CRA are now fraught with Seventh Amendment problems.

Some courts have recognized that the addition of a jury trial right requires a fundamental reconsideration of the use of class actions to adjudicate claims of intentional discrimination. For example, in *McKnight v. Circuit City Stores, Inc.*, 1996 WL 549363 (E.D. Va. Aug. 23, 1996), the court acted *sua sponte* to decertify a Title VII class, after recognizing the problems presented by bifurcation in this context:

> When all is said and done, even if plaintiffs are able to establish that Circuit City's allegedly excessive subjective decision making is a corporate device which makes individual cases of discrimination possible, or even probable, the focus of each individual plaintiff's proof, defendant's response to

> each plaintiff, and the jury's inquiry is whether each individual employment decision was motivated by intentional racial discrimination.

*Id.* at 4; *accord Brooks v. Circuit City Stores, Inc.*, 1996 WL 406684, 71 Fair Empl. Prac. Cas. (BNA) 102 (D. Md. June 17, 1996); *Zapata v. IBP, Inc.*, 1996 WL 327970 (D. Kan. May 15, 1996); *Appleton v. Deloitte & Touche LLP.*, 1996 WL 406175 (M.D. Tenn. July 3, 1996).

Other courts, however, blithely continue to apply pre-1991 precedents without regard to these important Seventh Amendment problems. *See, e.g., Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 (M.D. Fla. Mar. 2, 1996). That same oversight was no doubt a major factor contributing to the error made in the instant case, for the District Court, with one lone (and entirely inapposite) exception,[4] relied exclusively on pre-1991 cases to support its decision to pursue a two-phase trial plan in which liability issues would be subdivided based on the suitability of the evidence for class treatment.[5]

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[4] The sole post-CRA precedent relied on by the District Court was *Arnold v. United Artists Theatre Circuit Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994), which involved a disability discrimination claim by customers -- not employees -- of a movie theatre alleging discriminatory access. The plaintiffs' primary objective was injunctive relief to compel the owners of the theatres to make them accessible for wheelchairs, and so they sought only the statutory minimum damage award. Thus *Arnold* is factually inapposite and provides no support for the District Court's conclusion in this case.

[5] Commentators examining the implications of the 1991 amendments contained in the CRA have also acknowledged the Seventh Amendment problems raised in this context:

> The availability of jury trials and individualized determinations of money damages [in Title VII actions] may work to the disadvantage of certain plaintiffs by making class action suits impracticable for intentional discrimination claims . . . . Under the old regime of bench trials and equitable relief only, courts generally proceeded with class action pattern-or-practice suits by bifurcating

The Court should resolve this split among the circuits at the earliest opportunity. This division of authority with respect to a fundamental constitutional issue creates substantial disruption in the context of both mass torts and employment discrimination litigation. The experience of Home Depot in this litigation provides a clear example. Two other regional class actions have been filed against Home Depot, raising essentially the identical claims. While the suit that was filed in Louisiana -- the land of *Castano* and *Celestine* -- has not been certified (and certification under Rule 23(b)(2) has been ruled out), the same suit filed in California -- where *Valentino* and *Arthur Young* define the law of the Circuit -- has gone forward as a class action under Rule 23(b)(2). The rights of defendants and potential class members should not depend on the fortuity of where the plaintiffs' class-action counsel decides to initiate suit. Moreover, the fairness concerns raised by this split are particularly acute in light of the recent trend toward the filing of nationwide class actions. In such actions the lawyers for the putative class have almost unlimited discretion to choose their forum. Since such a class action can literally be initiated anywhere in the nation, the split of authority will draw cases, not to the most natural forum, but to the forum with the most accommodating position on the grave Seventh Amendment issues raised in these kinds of cases.

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> determinations of equitable relief. Under the new system, either party may demand a jury trial. Employers may argue that they have a Seventh Amendment right to have the same jury determine liability and damages.

David A. Cathcart & Mark Snyderman, *Employment and Labor Law, The Civil Rights Act of 1991*, C983 ALI-ABA 189, 215 (1995); *see also* 3 *Manual for Complex Litigation* § 33.54, at 354-55 (1995).

## II. THIS CASE ALSO RAISES THE INTERPRETIVE AND CONSTITUTIONAL ISSUES THAT THE COURT REVIEWED BUT WAS UNABLE TO RESOLVE IN *TICOR TITLE INS. CO. v. BROWN*, AND THE CONSTITUTIONAL ISSUE ON WHICH THE COURT HAS AGAIN GRANTED REVIEW IN *ADAMS v. ROBERTSON*.

The Court granted certiorari in *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), to consider whether, in a class action that includes claims for significant monetary damages but is nonetheless certified under Federal Civil Rule 23(b)(2), due process requires that individual class members have an opportunity to opt out of the class. *Adams v. Robertson*, No. 95-1873, in which the Court has granted certiorari and will soon hear oral argument, raises substantially the same issue under Alabama Civil Rule 23, which is modeled on Federal Civil Rule 23. *See Adams v. Robertson*, 676 So.2d 1265, 1268 (Ala. 1995), *cert. granted*, 117 S. Ct. 37 (1996). Home Depot has raised the same constitutional issue in this case, contending that certification of class claims that seek significant awards of compensatory and punitive damages is a misapplication of Rule 23(b)(2) that denies both Home Depot and absent class members important constitutional and procedural protections.[6] In particular, the Due Process Clause confers the right to opt out of a class action "seeking to bind known plaintiffs concerning claims wholly or predominantly for money judgments." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 811 n.3 (1985). At a minimum, therefore, the Court should hold this petition pending its resolution of the *Adams* case.

Indeed, Home Depot respectfully suggests that this case is a better vehicle than *Adams* because it permits this Court to consider both the constitutional issue raised in *Ticor Title* and *Adams*, and whether Federal Rule 23 can be interpreted to avoid

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[6] Home Depot has standing to raise the due process rights of absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

that constitutional difficulty. Because this case arises under the Federal Rules of Civil Procedure, it permits the Court either to address the due process issue directly or to consider whether it should interpret Federal Civil Rule 23 in a manner that avoids the necessity of resolving the constitutional question. The latter alternative, of course, is not open in *Adams*, which arose under Alabama Civil Rule 23, because this Court does not have any authority to construe provisions of state law. Nonetheless, because many States, including Alabama, look to Federal Rule 23 and this Court's interpretations of the federal rule for guidance, the constitutional issue being considered by the Court in *Adams* might be rendered entirely hypothetical if Federal Rule 23 is interpreted to forbid certifications like the one at issue in *Adams*. Home Depot, therefore, urges the Court to consider carefully the advantages of granting this petition and dismissing the petition in *Adams* as improvidently granted. As an alternative, the Court could grant this petition and decide this case in tandem with *Adams* during this Term. At an absolute minimum, this Court should hold this petition until the Court has resolved the *Adams* case.

To explain the posture of these issues more fully, some brief background is in order. In *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), dissatisfied members of a Rule 23(b)(2) class collaterally attacked the class certification order on due process grounds after failing to convince the Third Circuit on direct appeal that the class was improperly certified under Federal Rule 23(b)(2). The Ninth Circuit held that the Due Process Clause requires class members to have the opportunity to opt out of the class-action suit with regard to their claims for monetary damages. *Id.* at 392. Accordingly, while leaving intact the injunctive aspects of the original Rule 23(b)(2) class action, the court excused the dissatisfied class members from the preclusive effect of the class action with respect to their monetary claims and allowed them to pursue those claims anew. This Court granted certiorari to review the due process issues raised by the Ninth Circuit's ruling. *Ticor Title Ins. Co. v. Brown*, 510 U.S. 810 (1993).

After full briefing and oral argument on the due process

issue, the Court dismissed the writ as improvidently granted because the procedural posture of *Ticor Title* did not allow the Court the option of interpreting Federal Rule 23 to avoid the constitutional issue. *See Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994) (*per curiam*). The propriety of the original certification order under Rule 23(b)(2) was *res judicata*, and therefore the Court could not avoid the due process question by interpreting Rule 23 to require that class actions involving significant claims for monetary damages be certified under Rule 23(b)(3), which contains an opt-out provision, rather than under (b)(2), which does not. The Court indicated that there was "at least a substantial possibility" that Rule 23 could be interpreted in such a manner, which would avoid the necessity of deciding the constitutional question at all. 114 S.Ct. at 1361.

The Court has now underscored the importance of the constitutional issue by granting the petition in the *Adams* case. In *Adams*, however, the constitutional issue arises against the backdrop of a binding interpretation of Alabama Civil Rule 23 by the Alabama state courts, which squarely necessitates resolution of the constitutional issue. This case, by contrast, affords the Court the opportunity to consider *both* the constitutional question that the Court has found sufficiently compelling to grant certiorari twice already, *and* the threshold interpretive issue posed under Federal Civil Rule 23, which a majority of the Court thought so substantial that it took the unusual step of dismissing the petition in *Ticor Title* without resolving the constitutional issue on which it had granted certiorari. Unlike *Ticor Title*, this case is a direct -- as opposed to a collateral -- attack on the District Court's certification of a class under Federal Rule 23(b)(2). As a result, the Rule 23 issue is not *res judicata* -- both the nonconstitutional and constitutional issues are properly before this Court. Hence, the Court is free to decide either that the Due Process Clause requires class members to have an opportunity to opt out in a suit involving substantial monetary damages, or that Federal Rule 23 should be construed to avoid any constitutional problem by clarifying that such a suit cannot be certified as a

class action under Rule 23(b)(2).[7]

As the Court explicitly recognized in *Ticor Title*, this nonconstitutional issue is substantial. The certification of class actions seeking monetary damages under Rule 23(b)(2) fundamentally distorts the procedural scheme embodied in Rule 23. The provisions of Rule 23 have been carefully drafted to promote the efficient resolution of common claims while protecting the rights and interests of both the class plaintiffs and defendants. Unlike subsection (b)(3), subsection (b)(2) of the Rule does not provide for an opt-out right or any other check to ensure that common issues predominate and that the class action vehicle is a superior means of resolving the individual claims.

The absence of these protections is understandable when the class action is limited to injunctive relief, because in that situation such protections are wholly unnecessary. If injunctive relief truly affects all members of a defined class equally, then all members of the class will enjoy the benefits of the injunction even if some of them are excluded from the class. In those circumstances, an opt-out right would be superfluous. *See, e.g.*, 5 H. Newberg, *Newberg on Class Actions* § 24.81 at 24-264 (3d ed. 1992). By the same token, a finding that the defendant has acted in a way that can be remedied by "injunctive relief or corresponding declaratory relief with respect to the class as a whole," Fed R. Civ. P. 23(b)(2), also obviates the need for the "predominance" and "superiority" checks of Rule 23(b)(3). It is hard to imagine how a case could satisfy this criterion unless common issues do predominate and a class action is the

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[7] In short, to avoid the problem encountered in *Ticor Title*, the Court must grant certiorari in a case, like this one, which is on direct review. The due process issue can only arise in two contexts: on direct review of a class certification order under Rule 23(b)(2), or as a collateral attack on such an order by dissatisfied class members. In *Ticor Title*, the Court fully explained the shortcomings of resolving the due process issue on collateral review; the only remaining avenue for addressing this important question is in a case like this one.

superior mechanism for resolving the litigation. By contrast, if claims for monetary damages are smuggled into a Rule 23(b)(2) class action, then the opt-out right is wiped out and no substitute for the necessary checks of Rule 23(b)(3) is provided, thus eliminating all of the procedural protections ordinarily afforded under Rule 23.

The trial court in this case did not avoid these problems by purporting to defer consideration of how individual damage cases would be tried. To be sure, the District Court certified an "injunctive class" under Rule 23(b)(2) to address "liability and relief applicable to the class as a whole," as well as "whether defendant is liable for punitive damages," and then put off making any determinations about issues of "individual compensatory and equitable relief" until an unspecified future point, if at all. App. 12a. But this will not do. If only some (heretofore unspecified) claim for injunctive relief is appropriate for class treatment, then that claim is all that can be properly certified for class treatment. The court cannot hold hostage all the class members and their damage claims, as well as the defendant, until some future point when the court will make up its mind. This mischievous two-step eviscerates the up-front protections of Rule 23, which were consciously designed to prevent certification of unmanageable or inappropriate classes. If left unchecked, this approach will continue to have a pernicious influence on other courts. This case, therefore, provides a particularly appropriate vehicle for the Court to clarify the proper and limited scope of class certifications under Federal Rule 23(b)(2).

Resolution of *both* the interpretive *and* the constitutional issues raised in this petition is therefore of critical importance as a matter of judicial administration for the federal trial courts. The Court's decision to dismiss the petition in *Ticor Title* left unresolved these important threshold issues concerning the propriety of certifying a class seeking substantial monetary damages under Rule 23 (b)(2). The Court's decision to grant certiorari in *Adams* reinforces the importance of the constitutional issue. But the question concerning the proper interpretation of Federal Civil Rule 23 -- which may make

resolution of the constitutional question unnecessary at least with respect to the federal courts and state courts that follow this Court's interpretation of the federal rule -- will inevitably remain unresolved after the *Adams* case is decided. In *Ticor Title*, this Court expressed a sound preference to defer the due process issue for resolution in a case that would permit it to consider the relative merits of resolving the issue either by interpreting Rule 23 to avoid any constitutional problem or by deciding the due process question directly. This petition provides that opportunity. The *Adams* case does not. As a consequence, this Court should dismiss the petition in *Adams* as improvidently granted and grant this petition. In the alternative, the Court should grant this case and decide it in tandem with *Adams* during this term. At a minimum, however, this Court certainly should hold this petition pending the decision in *Adams*.

## III. THIS PETITION PROVIDES AN APPROPRIATE VEHICLE FOR RESOLVING THESE IMPORTANT ISSUES.

The fact that this case comes to the Court after denial of a petition for mandamus below should not deter the Court from granting certiorari. Although in some areas of the law this procedural posture might give rise to some prudential hesitation about whether this Court should grant review, that is emphatically not the case with respect to issues relating to class certification orders, especially when Seventh Amendment rights are at stake.

In the first place, it is at the mandamus stage that disputes over the propriety of class certification are most crisply presented. For this reason, a host of circuit courts recently have addressed important issues relating to class certification at an interlocutory stage. *See, e.g., Valentino v. Carter-Wallace*, 97 F.3d 1227 (9th Cir. 1996) (reviewing certification order under 28 U.S.C. § 1292(b)); *In re American Medical Sys.*, 75 F.2d 1069 (6th Cir. 1996) (granting petition for mandamus); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)

(reviewing certification order under 28 U.S.C. § 1292(b)); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) (granting petition for mandamus).

Indeed, the reality is that these important cases and issues *must* be reviewed on mandamus or interlocutory review if they are to be reviewed at all. The pressure to settle a case in the wake of an unsuccessful effort to resist class certification is overwhelming. Indeed, plaintiffs' attorneys and certifying courts seem to count on the fact that these cases will settle once they are forced into that posture. The Seventh Circuit expressly acknowledged this reality in *Rhone-Poulenc*: "The reason that an appeal will come too late to provide effective relief for these defendants," the court reasoned, "is the sheer magnitude of the risk to which the class action, as opposed to the individual actions pending or likely, exposes them." 51 F.3d at 1297. That risk creates an "intense pressure to settle." *Id.* at 1298. And "[i]f they settle, the class certification -- the ruling that will have forced them to settle -- will never be reviewed." *Id. Castano* likewise acknowledged that "class certification creates insurmountable pressure to settle, whereas individual trials would not." 84 F.3d at 746. This is true without regard to the ultimate likelihood of success on the merits: "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Id.* Accordingly, with respect to the important issues raised in this petition, review by this Court, if it is to come at all, must come from a case in an interlocutory posture.

In addition, there should be no hesitation to accept this case in an interlocutory posture in light of the important Seventh Amendment rights at stake. "The protection of the right conferred by the Seventh Amendment to trial by jury in federal civil cases is a traditional office of the writ of mandamus." *Rhone-Poulenc*, 51 F.3d at 1303. This Court has not hesitated to grant certiorari at an interlocutory stage when such rights are at issue. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500, 510-

11 (1959).[8]

Finally, the unusual procedure employed by the Ninth Circuit in this case puts a premium on the thorough consideration of this petition. Not only did the appellate panel give short shrift to the arguments raised in Home Depot's mandamus petition, but the panel took the unusual step of barring Home Depot from filing a motion for reconsideration of the panel decision to the *en banc* court. While such truncated review would be a cause for concern with respect to any petition, the panel's aggressive moves to preclude any further judicial review are particularly troubling in a case like this one, in which the petition for rehearing *en banc* attempted to inform the full court of a disagreement between the panel and a decision rendered by another circuit. Although the Federal Rules of Appellate Procedure permit the circuit courts to deviate from the general practice of permitting petitions for rehearing *en banc*, on the rare occasions when a circuit court takes such an unusual step, it is incumbent upon this Court to give the ensuing petition for certiorari full consideration.

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[8] Review of this case would also be consistent with the Court's historical use of mandamus "as a means of policing compliance with the procedural rules" in civil cases. *Will v. United States*, 389 U.S. 90, 100 n.10 (1967); *accord LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) (mandamus proper to remedy District Court's abuse of discretion in appointing master); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (mandamus appropriate where District Court exceeded power under Fed. R. Civ. P. 35 in ordering physical exam).

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted or, in the alternative, this petition should be held pending the Court's resolution of *Adams v. Robertson*, No. 95-1873.

Respectfully submitted,

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December 12, 1996

**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 13, 1996**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70495

DC#CV-94-4335-SYI
Northern California

HOME DEPOT USA, INC.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

and

VICKI BUTLER, et al.,

Real Parties In Interest.

ORDER

Before: FLETCHER, BRUNETTI and NOONAN, Circuit Judges

The motions filed by Home Depot, USA, Inc. for leave to file additional case authority and denied.

*Appendix A*

The motion filed by California Employment Law Council and Lawyers for Civil Justice for leave to file an amici curiae brief is denied.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED MAY 30, 1996**

IN THE UNITED STATES COURT DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-4335 SI
C-95-2182 SI

VICKI BUTLER, et al.,

Plaintiffs,

v.

HOME DEPOT, INC.,

Defendant.

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TERESA FRANK, KATHERINE TOMA, and KATHLEEN YORK, et al.

---

Plaintiffs,

v.

HOME DEPOT, INC.

Defendant.

**ORDER:**

(1) **DENYING MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL (28 U.S.C. § 1292 (b));**

*Appendix B*

**(2) SETTING SCHEDULE;**
**(3) REGULATING COMMUNICATIONS WITH CLASS MEMBERS; AND**
**(4) DIRECTING FORM OF NOTICE**

**1. DENIAL OF MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

On March 29, 1996, the Court heard argument on the defendant Home Depot's motion for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Having considered the arguments of counsel and the papers submitted, including the recently-submitted opinions concerning tort claims in the tobacco litigation, the Court DENIES Home Depot's motion. The Court does not find that the exceptional circumstances required by 28 U.S.C. § 1292(b) are present here.

**2. PRELIMINARY PRETRIAL AND SCHEDULING ORDERS**

On May 17, 1996, the Court heard argument on the defendant Home Depot's motion to communicate *ex parte* with certain class members; the parties' motions regarding the proper form of notice, if any, the should be mailed to Home Depot's female employees; the parties' motions concerning the scope and content of the first and second phases of this case; Home Depot's motion to depose the 64 class members who filed declarations in support of the plaintiffs' motion for class certification; and the parties' motions regarding pre-trial and trial scheduling.

*Appendix B*

**A. Communication With Class Members and Class Notice**

The class in this case consists of females who are present or former Home Depot employees in various job positions. Home Depot requests permission to communicate about this litigation, *ex parte*, with its current female employees, in order that it can conveniently prepare its defense. Plaintiffs object, pointing out that the female Home Depot employees are, on account of the class certification, clients of plaintiffs', counsel; thus, they argue, the rules of professional conduct which govern counsel preclude such *ex parte* communication.[1]

All class members are clients of plaintiffs' class counsel. However, Home Depot's current officers, directors and managing agents (in this case including department supervisors, assistant store managers and store managers) are clients of Home Depot's counsel.[2] Some current female employees fall into both categories, and it is to those employees that the motions are directed.

In addition, given the close relationship between class members and defendant in this case, it has been agreed that formal written notice should be presented to the class, informing them of the status of this matter.

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[1] *See* Rule 2-100, California Rules of Professional Conduct, Business & Professions Code §§ 6076, 6077.

[2] Former female employees, whether management lever or otherwise, may be class members but are not clients of Home Depot's counsel and thus are not available for defendants *ex parte* communications pursuant to this order.

*Appendix B*

The parties have submitted competing versions of a proposed class notice and of an order regulating class communications; they appear unable to agree among themselves as to format. The Court has therefore issued the attached orders dealing with these issues. The content of the notice and the limits of communication may be altered only by stipulation of all parties.

**B. Separate Trials for Jury and Nonjury Issues**

Home Depot urges that Stage I of this action should be bifurcated, such that the Court would hear the statistical evidence relating to disparate impact and make its determinations with respect to plaintiffs' claim for equitable relief before the jury is empaneled. The Court DENIES Home Depot's request. Nothing in the Civil Rights Act of 1991, 42 U.S.C. § 1981a, mandates separate trials of jury and nonjury issues, and such a procedure would unnecessarily lengthen this case. Much of the evidence which would be offered to the Court on the disparate impact theory will also be provided to the jury in connection with the disparate treatment theory. any determinations which must be made prior to trial pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2795 (1993) can be handled without the necessity of conducting two full-fledged trials of the statistical material.[3]

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[3] It is not clear how applicable *Daubert* will be to the evidence in this case, which will presumably consist largely of statistical evaluations. Different experts may well draw different conclusions from the same underlying data, but the use statistical tools in the employment context can hardly be characterized as "novel" or "experimental." *Id.* 2792.

*Appendix B*

**C. Claims of Named Class Representatives**

The parties requested clarification regarding whether the individual damage claims of the class representatives will be tried during Stage I or Stage II. As stated by this Court in the January 25, 1996 order certifying this action for class treatment, the individual claims for compensatory damages, and other particularized individual relief, will be litigated in Stage II. The first stage of this lawsuit will adjudicate the claims that pertain to the class as a whole — injunctive, declaratory and, if intentional discrimination is found by the jury, entitlement to punitive damages. Testimony by individual employees in Stage I would be for illustrative purposes, either to support or to rebut plaintiffs' class-wide contentions; but individual claims of individual employees, including the class representatives, will be resolve during Stage II.

**D. Depositions of Declarants re Class Certification**

Home Depot argues that it should be allowed to depose the 64 individual class members who provided sworn declarations in support of class certification in this case. Home Depot urges that it needs these depositions not only for cross-examination purposes, should plaintiffs call these women as "anecdotal" witnesses at Stage I of the trial, but also to enable Home Depot to decide whether it will call some of the women as witnesses. Plaintiffs oppose the request, on the grounds that these are absent, not representative, class members and that since there are 64 of them, such depositions would be burdensome and unduly time-consuming.[4]

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[4] Plaintiffs also suggest that defendant is engaged in a fishing expedition whose unarticulated goal is to re-litigate the propriety of class-certification. Counsel for Home Depot stated on the record that taking the depositions of these women is for the sole purposes stated above, not to revisit this Court's typically finding in its January 25, 1996 Order certifying the class.

*Appendix B*

Home Depot's request is GRANTED, but with the following limitions: First, the subject matter of the depositions must be limited to the testimony given by the women in their declarations. Second, these depositions may be no more than four hours in length per individual declarant.

**E. Further Pretrial Scheduling**

The parties have been unable to agree upon a proposed schedule for pretrial and trial of this case. Therefore, the action shall proceed according to the following schedule, with the caveat that all Court dates are subject to change based upon the Court's calendar:

| | |
|---|---|
| *September 27, 1996:* | Parties to exchange list of anticipated Stage I trial witness (including "anecdotal" witnesses); |
| *February 28, 1997:* | Identification of expert witnesses and exchange of Stage I experts' reports; |
| *April 4, 1997:* | Stage I lay witness discovery cutoff; |

*April 25, 1997:* Stage I expert discovery cutoff;

*May 23, 1997:* Last date for filing any *Daubert* motion;

*June 20, 1997:* Last date for filing any summary judgement motions;

| | |
|---|---|
| August 22, 1997: | Stage I motions in limine due; Stage I trial briefs due; parties to exchange final lists of Stage I trial witnesses (except rebuttal witnesses); parties to exchange lists of Stage I trial exhibits (except any rebuttal or impeachment exhibits); |
| *September 2, 1997:* | Stage I pretrial conference and argument re: motions in limine; |
| *September 22, 1997:* | Stage I trial begins[5]; the length of trial will be set by the Court at a later time. |

**F. Other Issues**

The parties agreed to meet and confer on the issue of potential discovery masters, and to submit to the Court a list of mutually agreeable discovery masters. No names have been received to date; if no names are submitted by June 7, 1996, the Court will appoint a discovery master without further input from the parties.

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[5] Subject to change based upon the Court's criminal and trial calendar.

*Appendix B*

IT IS SO ORDERED.

Dated: May 29, 1996

s/ Susan Illston
SUSAN ILLSTON
United States

District Court

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-4335 SI

VICKI BUTLER, et al.,

Plaintiffs,

v.

HOME DEPOT, INC.,

Defendant.

ORDER CERTIFYING CLASS ACTION

On August 30, 1995, the Court heard argument on the plaintiffs' motion for class certification. On September 8, 1995; September 11, 1995; September 18, 1995; October 11, 1995; December 5, 1995; and December 6, 1995; the parties filed supplemental briefing and authorities. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS the plaintiffs' motion for class certification and adopts the following class definition:

> A. All female employees of Home Depot within the geographical area of Home Depot's West Coast Division who are or were employed on or after November 5, 1992, or who are or will be employed between this date and the date of entry of judgement in this class action: and

B. All female applicants who applied for employment in Home Depot stores within the geographical area of Home Depot's West Coast Division on or after November 5, 1992 and were qualified for employment in the positions of salespersons or assistant managers and who were not hired or were hired for cashier or other operations positions.

The Court further orders that this litigation be bifurcated into separate phases. The first phase will address liability and relief applicable to the class as a whole, including declaratory and injunctive relief, and whether defendant is liable for punitive damages. This phase of the action is certified under FRCP 23(b)(2). If liability is established, the second phase of this case will address appropriate individual compensatory and equitable relief, including individual entitlement to back and front pay. The precise procedures to be used during the second phase, if any, will be determined later in this litigation.

## BACKGROUND

This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the California Fair Employment and Housing Act, Government Code §§ 12940 *et seq.* (FEHA). The complaint in this action was filed on December 12, 1994. Plaintiffs Vicki Butler, Susan Ellis, Felicia Funderburk, Jacqueline Genero, Sheryle Jones, Kimberly Stoddard, and Cheryl Williams allege violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., § 20003 *et seq.*, and allege gender discrimination practices against female employees and applicants throughout Home Depot's West Coast Division (hereafter "WCD").

*Appendix C*

A. *Factual Background*

Plaintiffs allege that Home Depot discriminates based upon gender in nearly all aspects of its personnel decision-making, including: (1) hiring and patterns of gender-based segregation of jobs segregation and departments in initial job placement; (2) training; (3) transfer opportunities to merchandizing positions; (4) promotional opportunities to supervisorial and management of positions; and (5) compensation.

First, plaintiffs allege that the defendant's system of hiring, job assignment, training, promotions, and compensation is entirely subjective. They allege that there are no specific, entirely subjective. They allege that there are no specific, objective hiring criteria, nor are there objective criteria used to set pay levels, and that local gender biased male managers are therefore left broad discretion to make decisions that have an adverse affect upon women. Second, plaintiffs present statistical evidence of the low number of women in sales, merchandizing, managerial and supervisorial positions, and the high number of men in these positions; and of the high number of women in cashier and other operations positions, and the corresponding low number of men in these same positions. This statistical evidence, upon which plaintiffs rely heavily, suggests a high level of segregation by gender. Plaintiffs contend that this is particularly significant, given that Home Depot is a store that promotes from within, provides on the job training, and has no minimum qualifications for entry level jobs.

In support of their motion, plaintiffs have submitted the following materials: (1) the declarations of 55 members of the proposed class and of 8 other witnesses detailing incidents of

gender discrimination in connection with hiring, job assignments, training, promotions and compensation; (2) the EEOC charges of 10 members of the proposed class; (3) Home Depot's standardized personnel forms, procedures and training materials; (4) excerpts from the depositions of 10 Home Depot managers, and (5) the declaration of plaintiffs' expert, Professor William T. Bielby.

In opposition to the motion, defendant filed: (1) declarations of 30 witnesses who are or were employees of Home Depot; (2) various charts and compilations concerning plaintiffs' employment history; (3) declarations of two experts' and (4) excerpts from the depositions of class representatives.

B. *Legal Standard for Class Certification*

As a threshold to class certification. Rule 23(a) of the Federal Rules of Civil Procedure requires a showing of the following: (1) that the class is so numerous that joinder of all members is impracticable; (2) that there are common questions of law or fact; (3) that the representatives parties; claims or defenses are typical of the class claims or defenses; and (4) that the representative parties will fairly and adequately protect the class interests. The party moving for class certification bears the burden of showing that the 23(a) requirements are satisfied. *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 2370 (1982).

In addition to demonstrating that the Rule 23(a) requirements are met, the plaintiffs must establish one or more of the following grounds for maintaining the suit as a class action pursuant to F.R. Civ.P. 23(b): (1) that there is a risk of substantial prejudice from separate action; (2) that declaratory

or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication.

DISCUSSION

A. *Rule 23(a) Requirements*

*1. Rule 23(a)(1) — Numerosity*

Rule 23(a)(1) requires that the class be so numerous that the number of potential plaintiffs cannot be practicably joined. Whether joinder would be impracticable depends on the facts and circumstances of each case, and does not require any specific minimum number of class members. In the present case, it is undisputed that the proposed class numbers in the thousands. The Numerosity requirement is easily met.

*2. Rule 23(a)(2) — Common Questions of Law or Fact*

The requirement in Rule 23(a)(2) that there be questions of law or fact common to the class is satisfied by "the alleged existence of common discriminatory practices." The defendant's actions need not affect each class member in the same manner. *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994)(citation omitted).

The Court finds that plaintiffs have satisfied the commonality requirement by their challenge to defendant's uniform personnel policies under Title VII. Common issues include whether the plaintiffs can sustain their burden of proof under either the disparate treatment (intentional acts of

discrimination), or the disparate impact (not necessarily intentional) theories as to Home Depot's subjective employment practices. *See Jauregui v. Glendale,* 852 F.2d 1128, 1135-36 (9th Cir. 1988); *Gay v. Waiters' and Dairy Lunchmen's Union,* 696 F.2d 531, 534 (9th Cir. 1982). In addition, the evidence upon which plaintiffs' propose to rely — statistical evidence of widespread discrimination — is common to the class as a whole. *See Int'l Broth, of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *EEOC v. General Tel. Co.,* 885 F.2d 575, 579-82 (9th Cir. 1989) *cert. denied*, 11 S.Ct. 370 (1990). The inferences drawn from this evidence will be common to all class members and will raise common questions of law.

3. *Rule 23(a)(3) — Typicality*

In addition, the Court finds that the representative plaintiffs' claims are typical of the claims of the class. Plaintiffs contend that defendant maintains a personnel system characterize by the use of subjective criteria by male management with hostile and stereotypical attitudes toward women. Plaintiffs further allege that they were discriminated against with respect to initial job placement, equal pay, and denial of training and promotional opportunities. These class claims are the same claims raised by the class representatives, and the declarations filed in support of this motion demonstrate their typicality. The individual plaintiffs' claims depend upon proof of the same discriminatory employment practices complained of by and on behalf of the class members. Defendant's argument that these plaintiffs' claims are not typical is unpersuasive.

*Appendix C*

4. *Rule 23(a)(4) — Adequacy of Representation*

Adequacy of representation under Rule 23(a)(4) involves the satisfaction of two elements: 1) that the representative party's attorney be qualified, experienced and generally able to conduct the litigation; and 2) that the suit not be collusive and that the representative plaintiffs' interest not be antagonistic to those of the remainder of the class. *Harriss v. Pan American World Airways,* 15 FEP Cases at 1649.

The first element of the adequacy requirement is easily satisfied by the competence and experience in handling complex class action lawsuits of the firms representing plaintiffs.

With respect to the second element, defendant objects to the inclusion of applicants in the class contending that applicants have different and "antagonistic" interests from employed class members since they are all competing "to get into the same sales and management positions." (Def. Br. at 5-6). Defendant also argues that no named representative is an applicant, because plaintiffs' former applicant representative, Wilson, is time-barred. Defendant further argues that the presence of both supervisory and non-supervisory personnel in the proposed class precludes certification.

Plaintiffs concede that Wilson has been removed as a class representative, but argue that the absence of an applicant representative does not preclude class certification. Plaintiff cites several cases in which courts reversed decertification of classes comprised of both employees and applicants. *See Watson v. Fort Worth Bank & Trust,* 798 F.2d 791, 795-6 (5th Cir. 1986), *vac'd and remanded on other grounds,* 487 U.S. 977

(1988) (reversing decertification of a class combining applicants and employees, stating that proof that an employer acted under a policy of discrimination could support certification of a class comprised of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general way, such as through subjective decisionmaking). Furthermore, plaintiffs argue that the Court may permit counsel to designate an appropriate employee member of the class to serve as an applicant representative.

Plaintiffs are correct that classes comprising both employees and applicants can be certified together. *General Telephone v. Falcon*, 457 U.S. at 159 n.15 (1982). Courts have routinely found that allegations that an employer operated under a general policy of discrimination can justify a class comprised of a diverse set of individuals. *Neal v. Moore (*D.D.C. No. 93-2420 (1994), Mem. Op. at 22), citing *Richardson v. Byrd,* 709 F.2d 1016, 1020 (5th Cir. 1983) (job assignment policy affected both employees and applicants). Some courts have concluded that "subjective decision-making" infected a company's employment practices as a whole, such that a broadly defined class is warranted. *Neal v. Moore* at 22, citing, *Brown v. Eckerd Drugs, Inc.*, 564 F.Supp. 1440, 1446 (W.D.N.C. 1983).

Moreover, as will be discussed in further detail below, any potential problems inherent in the fact that the proposed class in the present case is comprised of a diverse group of plaintiffs can be remedied by bifurcation of the case into a liability phase (addressing issues common to the class such as injunctive relief) and a remedial phase (addressing the individual compensatory damage claims). *See eg., Int'l Brotherhood of*

*Teamsters v. United States,* 431 U.S. 324 (1977). If there is a second, remedial phase of this case, supervisors and non-supervisors will all be able to come forward with evidence of their own specific claims for relief. During the first, liability phase, by contrast, the diversity of class membership will not present material conflicts.[1]

Accordingly, this Court finds that the interests of the representative plaintiffs are not antagonistic to the remainder of the class; and that plaintiffs have met their burden of proving adequacy of representation, both of counsel and of the class representatives.

B. *Rule 23(b) Requirements*

Once the four requirements of 23(a) have been met, the Court must determine whether the case meets any of the three requirements of Rule 23(b). Plaintiffs argue that this class should be certified under 23(b)(2), which provides in pertinent part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *

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[1] One Court has commented that "an injunction against a few supervisory members of the class — who most likely did not exert significant influence over departmental policy-making — is fairly characterized as *de minimus* relative to the value of such an injunction in protecting these same supervisors from epidemic discrimination." *Neal v. Moore* (D.D.C. No. 93-2420 (1994) Mem. Op. at 27)).

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .

Defendants argue that class certification under this subdivision is improper because the damages issues in this case predominate and "overwhelm" the requests for injunctive and declaratory relief.

In making this argument, defendant relies upon *McDonnell Douglas Corp. v. U.S. Dist. Ct., C.D. of Cal.*, 523 F.2d 1083, 1087 (9th Cir. 1975). The facts of the cases cited by defendant are completely inapposite. In *McDonnell Douglas*, a wrongful death action for damages resulting from an airplane crash, the Ninth Circuit found that the plaintiffs' claims for declaratory relief "added nothing to [plaintiffs'] claim for damages." In the present case, plaintiffs' claims for damages are secondary to their primary claim for injunctive relief to prohibit gender biased employment practices. The fact that plaintiffs seek damages in addition to declaratory and injunctive relief does not preclude certification under Rule 23(b)(2). *Probe v. State Teachers' Retirement System,* 780 F.2d 776, 780 (9th Cir. 1986). It is "well established . . . that employment discrimination suits involving such individual-specific awards of lost back pay may be maintained as (b)(2) class actions . . . ." *Arnold v. United Artists Theater Circuit, Inc.,* 158 F.R.D. 439, 453, citing, *Probe*, 780 F.2d at 780.[2]

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[2] Defendant also points to *Celestine v. Citgo Petroleum Corp., et al.*, Case No. 93-0864 (W.D. La.), in which Magistrate Judge Wilson's

(continued...)

*Appendix C*

Plaintiffs' allegations that the defendant maintains a policy and practice of denying women equal employment opportunities is sufficient to satisfy the Rule 23(b)(2) requirement. Defendant's arguments that the damage claims "overwhelm" the claims for injunctive relief are conclusory and, at this early stage, speculative. Accordingly, the Court finds that the first, liability phase of this case is appropriate for certification under Rule 23(b)(2).

C. *Bifurcation*

At oral argument, the Court requested supplemental briefing on whether this case could proceed in phases, and what, if any, constitutional limitations might affect such a process.[3]

In response to this request, plaintiffs have pointed to numerous cases, many of which are from the Northern District of California, indicating that the courts have routinely certified classes in similar employment discrimination cases by separating the trials into two phases. In Phase I, class wide damages and injunctive relief are determined. In Phase II — which the Court could certify now, or postpone until a later date

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[2] (...continued)
recommendation (filed 8/7/95) against class certification was adopted by the district court (9/11/95). This Court finds the analysis in that case inconsistent with controlling Ninth Circuit precedent and with other class action employment cases decided in this district. *See, e.g., Probe, supra, Perefield v. Chevron, supra; Arnold v. United Artists, supra.*

[3] Specifically, the Court requested briefing on the effect, if any, of the enactment of the Civil Rights Act of 1991 (amending Title VII to add claims for compensatory and punitive damages for intentional discrimination, and a right to jury trial), and the Seventh Amendment implications if this case were to be tried in separate phases before separate juries.

— the individual compensatory damages issues would be resolved. In *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994), Chief Judge Henderson addressed bifurcation of employment discrimination cases, and made the following general observations:

> According to the authors of the leading treatise on class actions, most courts adjudicating civil rights class action sin the employment discrimination context opt to bifurcate the liability and damages phases of the trial. 5 H. Newberg, *Class Actions* § 24.123 at 24-414-416 (3d ed. 1992). *See e.g., Teamsters v. United States,* 431 U.S. 324, 360-362, 97 S. Ct. 1843, 1867-68, 52 L.Ed.2d 395 (1977); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D.Cal. 1977); *Barefield v. Chevron,* 1988 WL 188433, 1988 U.S. Dist. LEXIS 15816, 48 Fair Empl. Cas. (BNA) 907 (N.D. Cal. 1988).

158 F.R.D. at 458-459. *See also Barefield v. Chevron,* 48 Fair Empl. Prac. Cas. (BNA) 907 (N.D. Cal. 1988).

Similarly, in *Stender v. Lucky Stores, Inc.*, N.D. Cal. No. C-88-1467 (MHP), Judge Patel bifurcated a class action employment discrimination case into two separate phases. The first phase of the trial addressed class liability and liability for punitive damages. The claims of the individual plaintiffs for damages were deferred to later proceedings.[4]

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[4] The case settled after Judge Patel issued Findings of Fact and Conclusions of Law; the court never held the second phase of the trial.

*Appendix C*

Defendant argues that bifurcation of liability and damages would violate its Seventh Amendment right to a fair trial, because different juries would be deciding essentially the same issues. *In re Innotron Diagnostics,* 800 F.2d 1077, 1986 (Fed. Cir. 1986). Defendant argues that whether each individual plaintiff "can establish liability and the measure of compensatory and punitive damages" would have to be considered again in the second phase of the trial.

This Court is not persuaded by these arguments. Courts have routinely adopted the approach advocated by plaintiffs in which the first phase of the proceedings focuses exclusively on classwide claims, e.g., whether a defendant has in fact engaged in discriminatory employment practices. A jury verdict in favor of plaintiffs at this phase would result in injustice and declaratory relief, and possibly, punitive damages. Individual compensatory damages would be resolved in the second phase of the proceedings which, since they would adjudicate individual claims, would not involve the "same issues" as did the first phase. As evidenced by the numerous cases across the country that have addressed this issue, the Seventh Amendment does not mandate that all phases of the litigation be heard by the same jury.

This Court will defer ruling on class certification with respect to the second phase of this trial. At such a time as it becomes necessary, the Court will adopt an approach that the Court and the parties can agree will best protect the rights of absent class members and defendant, in adjudicating the remaining issues.

*Appendix C*

D. *Other Issues*

The scope and starting and ending dates of the class are disputed by the parties. Defendant argues that the class is too broad, in that it encompasses those who might suffer some injury in the future. Plaintiffs have framed the class to include claims which arise between the class opening date, and the date of the entry of judgment in this action. In this respect, the Court does not find the class definition to be overly broad.

Defendants also argue that the named representatives are time-barred under Title VII and FEHA. With respect to the Title VII plaintiffs, the earliest filed charge is that of Kim Stoddard, who filed an EEOC and DFEH charge on November 5, 1993. Thus any claims that arose prior to January 9, 1993 (300 days prior to the November 5 date) must be excluded from the action.

With respect to the FEHA claims, defendant argues that the earliest proper DFEH claim was made on August 25, 1994 (by Funderburk) and thus any claims arising out of actions which occurred prior to August 25, 1993 (one year prior to the August 25 date) must be excluded. Defendant argues that plaintiff Stoddard's November 5, 1993 DFEH charge should be treated as ineffective, because Stoddard's lawsuit was not filed within one year after the DFEH issued her right to sue letter. Plaintiffs disagree, claiming that the class opening date for FEHA claims should be November 5, 1992 (one year prior to the date of Kim Stoddard's DFEH filing), and that Stoddard's claim is not timebarred because the statute of limitations for filing a complaint under FEHA may be equitable tolled during the pendency of an EEOC investigation. *EEOC v. Farmers Bros. Co.*, 31 F.3d 891 (9th Cir. 1994); *See also Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1326 (9th Cir. 1987). Plaintiffs argue that since the

EEOC was investigating Stoddard's claim until it issued her right-to-sue letter on September 22, 1994, Kim Stoddard's FEHA claim filed three months later was timely. This Court agrees. Accordingly, the class opening date for the Title VII issues as to all ten states in the WCD will be January 9, 1993. The class opening date for the FEHA claims in California will be November 5, 1992.

Finally, a related case — *Frank v. Home Depot, Inc.*, No. C-95-2182SI — has been filed against the same defendant with allegations that are almost identical to those in *Butler*. Plaintiffs have requested consolidation of these cases. Defendant points out that this motion was previously denied.[5] However, consolidation was denied before because adding new plaintiffs at that time would have necessitated modification of the briefing and discovery schedules with respect to the pending motion for class certification. In light of this Court's decision to grant plaintiffs' motion for class certification, these concerns are moot. Accordingly, the plaintiffs motion to consolidate is GRANTED.

## CONCLUSION

For the forgoing reasons and for good cause shown, the Court finds that the requirements of Rule 23(a) and (b)(2) have been satisfied, and determines that, subject to the terms and limitations discussed above, the actions may be maintained as a class action pursuant to the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

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[5] This case was then pending before the Hon. Vaughn Walker.

*Appendix C*

Dated: January 24, 1996.

s/Susan Illston
SUSAN ILLSTON
United States District Judge

**APPENDIX D — ORDERED OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA IN COMPANION CASE *GRIFFIN, ET AL. V. HOME DEPOT* FILED MAY 20, 1996**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 95-181

SECTION "L"

CAROL LEE GRIFFIN, et al.

VERSUS

HOME DEPOT, INC.

ORDER AND REASONS

Before the Court is defendant Home Depot, Inc.'s Motion to Dismiss the Class Action Aspects of this Case. This motion was taken under submission on the briefs. For the following reasons, the defendant's motion is denied.

BACKGROUND

The named plaintiffs in this matter include Carol Lee Griffin, Bonnie Bamber, Forrestine Holmes, and Patricia Toural (collectively "Plaintiffs"). Ms. Griffin was employed by Home Depot as a designer in New Orleans, Louisiana from February 5, 1991 until her discharge on June 3, 1994. Ms. Bamber was employed by Home Depot as a cashier in Nashville, Tennessee from August 26, 1992 through November

8, 1993, and subsequently employed as a cashier in Baton Rouge, Louisiana from November 12, 1993 until her discharge on November 13, 1994. Ms. Holmes was employed by Home Depot as a cashier in Baton Rouge, Louisiana from March 27, 1990 until her recent resignation. Ms. Toural was employed by Home Depot as a cashier, sales representative, and cashier supervisor in New Orleans and Baton Rouge, Louisiana from July 17, 1986 until her layoff on April 29, 1994.[1]

The plaintiffs filed the complaint with this Court on January 17, 1995 alleging both disparate treatment and disparate impact sex discrimination under Title VII. 42 U.S.C. §§ 2000e-2000e-17. The complaint was filed on behalf of themselves and on behalf of all past, present, and future female employees and applicants in Home Depot's Southeast, Northeast, Midwest and Midsouth Regions who have been or may be denied employment, desirable working hours, compensation and/or other terms and conditions of employment on the basis of sex. The plaintiffs seek not only injunctive and declaratory relief, but also damages for back pay, front pay, lost compensation and job benefits, emotional distress, humiliation, embarrassment, exemplary and punitive damages, attorneys' fees, and pre-judgment and post-judgment interest.

Home Depot has moved to dismiss the class action aspect of this case contending that based on the plaintiffs' allegations and the current state of the law, particularly the enhanced remedies provided under the 1991 Civil Rights Act, the plaintiffs' sex discrimination claims cannot be maintained on a

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[1] The parties have agreed to settle Ms. Toural's claim by reinstating her to employment, and she presumably will no longer be a party to this action.

class action basis because the plaintiffs cannot meet the requirements of either Fed. R. Civ. P.23(b)(2) or (b)(3). At this time, the Court does not agree with this assertion.

## LEGAL STANDARD

In deciding whether to certify a class, the court must perform a rigorous analysis of whether the class satisfied Federal Rule of Civil Procedure 23. However, the court may not inquire into the merits of the underlying case. *Heartland Communications, Inc. v. Sprint Corp.*, 161 F.R.D. 111 (D. Kan. 1995). The court must assume that the substantive allegations of the complaint are true. *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978).

## ANALYSIS

In order for class certification to be appropriate, the plaintiffs must establish that their class satisfies all of the requirements of Fed. R. Civ. P. 23(a) and at least one of the subsections of Fed. R. Civ.P.23(b). Rule 23(a) has four requirements: numerosity, commonality, typicality, and adequacy of representation. The parties, for the purposes of this motion, do not dispute that these four requirements are satisfied. As such, the plaintiffs must establish that they meet at least one of the subsections under Rule 23(b).

The plaintiffs argue that the class they seek to represent should be certified under Rule 23(b)(2) or (b)(3). The defendant argues that, as a matter of law, the plaintiffs cannot meet the requirements of either subsection. While the case law is sparse in this area of the law, there are two schools of thought on this issue which are supported by two competing cases: *Celestine v.*

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*Citgo Petroleum Corp.*, No. 93-864, slip op.at 6 (W.D.La. filed Aug. 7, 1995), *aff'd by Dist. Court*, 1995 WL 811969 (W.D. La. Sept. 11, 1995) (supporting the defendant's position) and *Butler v. Home Depot, Inc.*, 94-4335, slip op. (N.D. Cal. Jan. 25, 1996) (representing the plaintiffs' contentions).

1. *Certification Under Rule 23(b)(2)*

Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The primary limitation on certification under Rule 23(b)(2) is that injunctive and/or declaratory relief must be the predominate relief sought for the class. *Celestine v. Citgo Petroleum Corp.*, No. 93-864, slip op. at 6 (W.D. La. filed Aug. 7, 1995), *aff'd by Dist. Court*, 1995 WL 811969 (W.D. La. Sept. 11, 1995). Home Depot argues that since the passage of the Civil Rights Act of 1991, which allowed compensatory and punitive damages in cases involving intentional discrimination, class certification in Title VII cases is inappropriate.[2]

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[2] The Civil Rights Act of 1991 authorized the recovery of

(continued...)

*Appendix D*

Home Depot bases its argument on the *Celestine v. Citgo Petroleum Corp.*, supra. decision. In *Celestine*, the court concluded that the plaintiffs' demand for monetary damages precluded certification under Rule 23(b)(2). The court found that the issues surrounding the claims for injunctive relief and monetary damages were unrelated. *Celestine*, slip op. at 9. "The claim for injunctive relief requires the plaintiffs to show that there are policies and procedures which have a disparate impact on [female] employees and applicants while the claim for monetary damages requires each plaintiff to show that . . . she was actually adversely affected by the policies and procedures in place." *Id.* at 9-10. The court reasoned that because it would be necessary for the plaintiffs to present individualized evidence at separate hearings, monetary damages was the predominate type of relief sought. *Id.* at 10. Thus, class certification under Rule 23(b)(2) was not appropriate in that case.

However, a district court in the Ninth Circuit presented with this issue has reached another result. In *Butler v. Home Depot, Inc.*, 94-4335, slip op. (N.D. Cal. filed Jan. 25, 1996), a number of women employees of Home Depot alleged gender discrimination under Title VII and moved for class certification. When confronted with the Rule 23(b)(2) issue, the court found that the defendant's arguments that the plaintiffs' claims for monetary damages overwhelmed their claims for injunctive relief were "conclusory and, at this early stage, speculative." *Id* at 10. The *Butler* court believed that the plaintiffs' allegations that the defendant maintained

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[2] (...continued)
compensatory and punitive damages in cases involving intentional discrimination. 42 U.S.C. § 1981(a)(1). Prior to the passage of the Act, Title VII only afforded equitable relief.

discriminatory policies and practices were sufficient to satisfy the Rule 23(b)(2) requirements. *Id.*

This Court agrees with the reasoning of both *Butler* and *Celestine* on this issue. The defendant contends the Court should ignore *Butler* on the grounds that it is based solely on Ninth Circuit precedent and thus should be ignored by this Court in favor of *Celestine* which they say is based on Fifth Circuit case law. To the contrary, *Celestine* cites to a majority of cases from the Ninth Circuit and does not depend on Fifth Circuit law for its holding.[3] This Court does not find that Fifth Circuit precedent precludes the *Butler* reasoning in this instant. Thus, the Court agrees with *Butler* in that the 1991 amendments, giving victims of gender discrimination greater remedies, do not preclude the possibility of a class action in these types of cases. Such a finding is not supported by the legislative history of the amendments nor logical in light of Congress' intent. *See* House Report 102-40 (Part II), 102nd Cong. (May 17, 1991).[4]

Having found that the Civil Rights Act of 1991 does not preclude a class action under Rule 23(b)(2), the Court still must look at the pleadings in this case to determine if a class action is viable under the (b)(2) subsection. As stated above, the plaintiffs seek damages in the form of back pay, front pay, lost

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[3] There are very few cases which have actually addressed the issues raised in this motion which would explain the *Celestine* court's reliance on case law outside this circuit.

[4] This Court believes that Congress' intent was simply to make available to victims of intentional gender and religious discrimination the same remedies which are allowed for victims of intentional race discrimination.

compensation, job benefits, emotional distress, humiliation, embarrassment, punitive damages, and attorney's fees along with injunctive and declaratory relief. This Court finds that the predominate relief sought by this class is economic and not injunctive and/or declaratory. Therefore, possible certification of this class under Rule 23(b)(2) in not appropriate in this case.

2. *Certification Under Rule 23(b)(3)*

Rule 23(b)(3) provides in pertinent part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Therefore, in considering certification under Rule 23(b)(3), a court should consider not only commonality but also manageability and judicial economy. *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1104-05 (5th Cir. 1993).

Again, Home Depot relies on *Celestine* to argue that class action jury trials are not the most efficient manner of handling suits alleging intentional discrimination. *Celestine*, slip op. at 12. "If the court were to certify the injunctive claims a class

action wherein the pattern or practice claims would be tried to a jury and the disparsate impact claims would be tried to the judge, the pattern or practice claims would also have to be relitigated in each plaintiff's disparate treatment and damages cases if the parties' assertion that they are entitled to have the same jury determine liability and damages is true." *Id.* at 12-13.

In contrast, the *Butler* court determined that the case would best be handled if bifurcated. The *Butler* court noted that courts routinely certify classes in similar employment discrimination cases by separating the trials into two phases. *Butler*, slip op. at 11 (citing *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994)). In the first phase, class-wide damages and injunctive relief are determined. In the second phase, the individual compensatory damages issues are resolved. *Butler*, slip op. at 11. Because the second phase would involve adjuicating individual compensatory damage claims, it would not involve the same issues as did the first phase involving liability. *Id.* at 12. Furthmore, the Seventh Amendment does not mandate that all phases of the litigation be heard by the same jury. *Id.* at 12-13. While the court ruled class certification was proper for the first phase, the liability phase of the trial, the court deferred ruling on the issue of class certification with respect to the second phase of the trial. *Id.* at 13.

This Court agrees with the *Butler* decision that a case such as this one can be managed as a class action. Therefore, the issues of manageability and judicial economy do not preclude a class action here under Rule 23(b)(3). But the analysis does not end there, the Court must also determine if there are questions of law and fact common to all members of the proposed class. This is necessarily a fact specific inquiry. At present, no

discovery has been done and the Court has only the pleadings before it. At this juncture, one can postulate that there is sufficient commonality of facts to satisfy Rule 23(b)(3) but the plaintiff faces a considerable burden on this point.

Therefore, considering the posture of this case and the nature of this motion, this Court finds, at this time, the allegations made by the plaintiff are sufficient to meet the requirements of Rule 23(b)(3). This aspect of class certification may be revisited by the Court after the parties have pursued some discovery on these issues.

CONCLUSION

THEREFORE for the foregoing reasons IT IS ORDERED that defendant Home Depot's motion to dismiss the class action aspect of this case HEREBY DENIED at this time.

New Orleans, Louisiana, this 19 day of May, 1996.

s/Eldon E. Fallon
UNITED STATES DISTRICT JUDGE

## APPENDIX E -- FEDERAL RULE OF CIVIL PROCEDURE 23(b)(2) -- CLASS ACTIONS

**Rule 23. Class Actions**

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

**(2)** the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

# APPENDIX F --UNITED STATES CODE ANNOTATED
# TITLE 42. THE PUBLIC HEALTH AND WELFARE
## CHAPTER 21--CIVIL RIGHTS
## SUCHAPTER I--GENERALLY
**Current through P.L. 104-207, approved 9-30-96**

### § 1981a. Damages in cases of intentional discrimination in employment

**(a) Right of recovery**

**(1) Civil rights**

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

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**(2) Disability**

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C.A. § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

**(3) Reasonable accommodation and good faith effort**

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

**(b) Compensatory and punitive damages**

**(1) Determination of punitive damages**

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

**(2) Exclusions from compensatory damages**

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

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**(3) Limitations**

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

**(A)** in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

**(B)** in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

**(C)** in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

**(D)** in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

**(4) Construction**

Nothing in this section shall be construed to limit the scope of, or the
relief available under, section 1981 of this title.

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**(c) Jury trial**

If a complaining party seeks compensatory or punitive damages under this section--

**(1)** any party may demand a trial by jury; and

**(2)** the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

**(d) Definitions**

As used in this section:

**(1) Complaining party**

The term "complaining party" means--

**(A)** in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

**(B)** in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) [42 U.S.C.A. § 12111 et seq.].

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**(2) Discriminatory practice**

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

## APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT COURT OF NEW JERSEY

Civil Action No. 96-2927

MARJORIE TORTAJADA,
individually and on behalf
of all others similary situated, Plaintiff,
vs.

HOME DEPOT, INC.,
Defendant,

ORDER

This matter having come before the Court pursuant to the motion of the defendants to dismiss the class action aspects of the case at bar; and the Court having read and considered the papers submitted in support of and in opposition to said motion; and the Court having heard and considered the arguments of counsel; and the Court having explored with counsel the similarities between the case at bar and the matter of *Carol Lee Griffin v. Home Depot, Inc.*, currently pending in the United States District Court for the Eastern District of Louisiana (Civil No. 95-181§L); and good cause having been shown for the entry of the within Order, for the reasons expressed by the Court, on the record, on November 12, 1996,

It is on this 19th day of November, 1996, ORDERED that:

(1.) Defendant's motion is dismissed, without prejudice;

(2.) This action be, and it hereby is, stayed as to all class action claims and issues, until further order of this Court, for good cause shown; and

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(3.) This case shall continue, at this time before this Court, as an individual action by the plaintiff on the claims presented.

S/John W. Bissell
JOHN W. BISSELL
United States District Judge